



**FEDERAL ELECTION COMMISSION**  
WASHINGTON DC 20461

**September 29, 1993**

**MEMORANDUM**

**TO: The Commission**

**THROUGH: John C. Surina**  
**Staff Director**

**FROM: Lawrence M. Noble**  
**General Counsel**

**N. Bradley Litchfield**  
**Associate General Counsel**

**Jonathan M. Levin**  
**Senior Attorney**

**SUBJECT: Draft AO 1993-17**

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for October 7, 1993

**Attachment**

1  
2  
3 **ADVISORY OPINION 1993-17**

4 **Maureen E. Garde, Executive Director**  
5 **Massachusetts Democratic Party**  
6 **45 Bromfield Street**  
7 **Seventh Floor**  
8 **Boston, MA 02108**

**DRAFT**

9 **Dear Ms. Garde:**

10 **This responds to your letter dated August 26, 1993, on**  
11 **behalf of the Massachusetts Democratic Party ("the Party")**  
12 **concerning application of the Federal Election Campaign Act**  
13 **of 1971, as amended ("the Act"), and Commission regulations**  
14 **to the allocation of the Party's expenditures for its Federal**  
15 **and non-Federal activities when the State law mandates its**  
16 **own payment procedures for the Party's administrative**  
17 **expenses.**

18 **Your request indicates that there is a conflict between**  
19 **the way the Party interprets Commission regulations on the**  
20 **allocation of state party administrative expenses and the**  
21 **interpretation by the Office of Campaign & Political Finance**  
22 **of the Commonwealth of Massachusetts ("OCPF") as put forth in**  
23 **an interpretive bulletin issued in April 1993. The**  
24 **differences pertain to the percentage of state party**  
25 **administrative expenses allocated for Federal activity and**  
26 **for non-Federal activity, based upon "points" assigned to**  
27 **each type of activity.**

28 **According to Commission regulations, state party**  
29 **committees with separate Federal and non-Federal accounts**  
30 **must allocate their administrative expenses and generic voter**  
drive costs between those accounts using the "ballot

3 composition method." This method is based on the ratio of  
4 Federal offices to total Federal and non-Federal offices  
5 expected on the ballot in the state's next general election.  
6 11 CFR 106.5(d)(1)(i). The ballot composition ratio is  
7 determined at the start of each two-year Federal election  
8 cycle, in accordance with a point system set out in 11 CFR  
9 106.5 (see below).

10 The Party has disclosed on its Schedule H1 (the  
11 Commission disclosure page showing the point allocation and  
12 percentage) for the 1993-94 election cycle an allocation of  
13 two Federal points and four non-Federal points for a Federal  
14 to non-Federal allocation of 33 percent to 67 percent. This  
15 ratio is based on having one point each for the U.S. Senate  
16 and the U.S. House, and one point each for the governor,  
17 other statewide offices, state senate, and state  
18 representative. No points were allocated for local  
19 candidates.

20 The Party's allocation for Federal activity is higher  
21 than the percentage set out by the OCPF's interpretive  
22 bulletin, based on the assignment of fewer non-Federal points  
23 than is required by the OCPF. You present a number of  
24 reasons for the Party's allocation formula, including the  
25 Party's belief that (a) the use of the word "may" in the  
26 Commission's "Instructions for Preparing the Method of  
27 Allocation Schedule H-1" indicates the discretionary nature  
28 of counting non-Federal points, and (b) the "local  
29 candidates" category should include no points because the  
30

3 Party does not participate in any local elections and these  
4 local elections "are almost exclusively non-partisan in  
5 nature."

6 OCPF asserts, however, that the Party's non-Federal  
7 account must pay the full amount of the state share permitted  
8 by Federal regulation for any mixed activity. OCPF contends  
9 that Federal law does not preempt State law where Federal law  
10 permits payment of the state share of a mixed expense while  
11 the State law mandates such payment. Specifically, OCPF has  
12 required a 25/75 Federal/state allocation for state party  
13 committees, unless the party committee adds to the ratio an  
14 extra non-federal point permitted in the regulation (thus  
15 resulting in a 22/78 allocation). The 25/75 ratio is derived  
16 by assigning two Federal points, one each for the U.S. Senate  
17 and the House, and six non-Federal points, one for governor,  
18 two for other statewide offices, one for state senate, one  
19 for state representative, and one for local candidates.

20 In a comment letter submitted to the Commission, OCPF  
21 addressed the Party's assignment of zero points to the  
22 category for local candidates. It points out that, although  
23 the Party does not participate in local elections, other  
24 state committees of other parties might, and the Party may do  
25 so in the future. In addition, although most local elections  
26 in Massachusetts are non-partisan, there are still 25  
27 communities with "partisan preliminaries or caucuses."

28 You seek an advisory opinion as to whether the  
29 non-Federal points are discretionary or mandatory, according  
30

3 to Commission regulations. You also refer to the possible  
4 preemption of Massachusetts regulations by Commission  
5 regulations, and ask whether the Party may pay for all of its  
6 administrative costs out of its Federal account.

7 Commission regulations describe the ballot composition  
8 method as follows:

9 In calculating a ballot composition ratio, a  
10 state or local party committee shall count the  
11 federal offices of President, United States  
12 Senator, and United States Representative, if  
13 expected on the ballot in the next general  
14 election, as one federal office each. The  
15 committee shall count the non-federal offices of  
16 Governor, State Senator, and State Representative,  
17 if expected on the ballot in the next general  
18 election, as one non-federal office each. The  
19 committee shall count the total of all other  
20 partisan statewide executive candidates, if  
21 expected on the ballot in the next general  
22 election, as a maximum of two non-federal offices.  
23 State party committees shall also include in the  
24 ratio one additional non-federal office if any  
25 partisan local candidates are expected on the  
26 ballot in any regularly scheduled election during  
27 the two-year congressional election cycle. Local  
28 party committees shall also include in the ratio a  
29 maximum of two additional non-federal offices if  
30 any partisan local candidates are expected on the  
ballot in any regularly scheduled election during  
the two-year congressional election cycle. State  
and local party committees shall also include in  
the ratio one additional non-federal office.

11 CFR 106.5(d)(1)(ii).

#### 24 Discretionary Nature of the Non-Federal Points

25 The Commission notes language throughout 11 CFR  
26 106.5(d)(1)(ii) using the word "shall." Although the word  
27 "shall" carries a presumption that it is used in the  
28 imperative, legislative history and purpose are relevant in  
29 making such a determination. See Sutherland Statutory

3 Construction §§57.01-57.05 (5th Ed.). The Explanation and  
4 Justification of the regulation as initially promulgated in  
5 June 1990, and, as amended in March 1992, indicates the  
6 non-imperative nature of the assignment of non-Federal  
7 points. In March 1990, when the Commission promulgated  
8 comprehensive regulations on allocation, the Commission  
9 expressed its view that

10 allocating a portion of certain costs to a  
11 committee's non-federal account is a permissive  
12 rather than a mandated procedure. Thus, the  
13 amounts that would be calculated under the rules  
14 for a committee's federal share of allocable  
expenses represent the minimum amounts to be paid  
from the committee's federal account, without  
precluding the committee from paying a higher  
percentage with federal funds.

15 55 Fed. Reg. 26058, 26063 (June 26, 1990).

16 When discussing the points for "other partisan statewide  
17 executive candidates," the Explanation and Justification  
18 referred to independently elected lieutenant gubernatorial  
19 candidates, and stated that that office "may be counted  
20 separately from the governor." [emphasis added]. Id. at  
21 26064. In addition, when the Commission amended the rules on  
22 allocation of administrative costs by state and local party  
23 committees, the Explanation and Justification stated that  
24 party committees "may add an additional non-federal point"  
25 and "may also include non-federal point(s) for local offices  
26 if partisan local candidates are expected on the ballot in  
27 any regularly scheduled election during the two- year  
28 congressional election cycle." [emphasis added]. 57 Fed.  
29 Reg. 8990 (March 13, 1992). In further discussing the  
30

additional points for local office races, the Commission referred to the Notice of Proposed Rulemaking, whose approach was being affirmed, as proposing that "(d)(1)(ii) be amended to allow" the inclusion of the points [emphasis added]. Id. at 8991.

Based on the foregoing, the Commission concludes that the non-Federal points are not mandatory under Federal law. The allocation regulations impose a floor on Federal points and a ceiling on non-Federal points. A state party committee may take the highest number of non-Federal points allowable and must take the minimum number of Federal points that are required. A state party committee that proposes to apply a ratio entailing a higher Federal percentage may do so, but, to avoid confusion, should file an H1 reflecting that percentage.<sup>1/</sup>

#### Federal Preemption of State Law

Although the Commission has determined that the non-Federal points in the allocation ratio are discretionary, the practical effect of this determination with respect to your request depends upon whether Federal law preempts the application of State requirements.

The Act states that its provisions and the rules

---

<sup>1/</sup> If the higher Federal percentage will be applied to particular administrative expenses, the committee is advised to file an H1 specifying those expenses. If a state party committee chooses to pay a higher than minimum Federal share for any particular administrative expense, it may not make adjustments in other administrative expenditures in order to "recapture" the difference between that optional higher Federal share and the required Federal minimum share.

prescribed thereunder, "supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. §453. The House committee that drafted this provision intended "to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974). According to the Conference Committee report on the 1974 Amendments to the Act, "Federal law occupies the field with respect to criminal sanctions relating to limitations on campaign expenditures, the sources of campaign funds used in Federal races, the conduct of Federal campaigns, and similar offenses, but does not affect the States' rights" as to other areas such as voter fraud and ballot theft. H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 69 (1974). The Conference report also states that Federal law occupies the field with respect to reporting and disclosure of political contributions to and expenditures by Federal candidates and political committees, but does not affect state laws as to the manner of qualifying as a candidate, or the dates and places of elections. Id. at 100-101.

These principles are codified in the Commission regulations which provide for Federal preemption with respect to the organization and registration of political committees supporting Federal candidates, disclosure of receipts and expenditures by Federal candidates and political committees,



3 and the limitations on contributions and expenditures  
4 regarding Federal candidates and political committees.  
5 Federal Election Commission Regulations, Explanation and  
6 Justification, House Document No. 95-44, at 51. 11 CFR  
7 108.7(b).

8 The Commission has previously asserted the Act's  
9 preemption of state law with respect to the Federal  
10 activities of state party committees. See Advisory Opinions  
11 1989-25 and 1978-50. The Act "does not, however, preempt  
12 state law with respect to the reporting of receipts and  
13 disbursements of funds used for non-Federal election purposes  
14 or the registration and reporting of non-Federal accounts or  
15 state committees." Advisory Opinion 1986-27.

16 Because of the flexibility built into the allocation  
17 regulations, wherein there is a minimum Federal percentage  
18 but a range of non-Federal points that a state party may use  
19 within the limits of the regulation, the question arises as  
20 to the parameters of the field that Federal law occupies.  
21 The Commission interprets the flexibility in 11 CFR  
22 106.5(d)(1)(ii) as allowing the states to view as non-Federal  
23 those administrative expenses that are within the permissible  
24 range; i.e., that Federal preemption would extend only as far  
25 as is necessary to ensure that the state not interfere with  
26 the minimum Federal percentage provided for in Commission  
27 regulations. The Commission concludes, therefore, that the  
28 Commonwealth of Massachusetts may require the Party to comply  
29 with Massachusetts requirements for the allocation on  
30

Schedule H1. Accordingly, Massachusetts may preclude the Party from paying for all of its administrative costs out of its Federal account, and it may also bar the Party from paying a greater share of its administrative expenses from its Federal account than would be required by Commission regulations.

The Commission notes that this conclusion is limited to the assignment of points on the Schedule H1 and the payment of administrative costs by a state or local party committee in accordance with the resultant percentages. In addition, the Commission cautions that its conclusions do not relate to any other subjects or points covered in the above-referenced interpretive bulletin, e.g., the State requirement that state party committees must file monthly reports disclosing payees paid from the Federal account for joint or allocable expenses and related information.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. §437f.

Sincerely,

Scott E. Thomas  
Chairman

Enclosures (AOs 1989-25, 1986-27, and 1978-50)